IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

FAO No. 629 of 2003

Date of decision 12.10.2007

Gian Chand Tank **..Appellant**

Versus

Pushpa Panwar **..Respondent**

Coram

The Hon'ble Mr. Justice Deepak Gupta, Judge.

Whether approved for reporting?[1] No

For the Appellant: Mr. Sanjeev Kuthiala, Advocate

For the Respondents: Mr. Bimal Gupta, Advocate

Deepak Gupta, J. (Oral)

This appeal is directed against the judgment of the learned Additional District Judge, Sirmour district at Nahan in Civil Appeal No. 4-N/13 of 2001 whereby he has set aside the judgment and decree dated 4th May, 2001 passed by the Civil Judge (Senior Division), Sirmour at Nahan decreeing the suit filed by the plaintiff, Gian Chand Tank against the defendant, Smt. Pushpa Panwar.

It is not necessary to give entire facts of the case. However, it would be pertinent to mention that the

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[1] ***Whether the reporters of the local papers may be allowed to see the Judgment?***

plaintiff filed a suit claiming to be owner in possession of the suit land and prayed that the defendant be restrained from raising any construction over the suit land and in case the defendant has forcibly extended the slab of her construction towards the suit land, the same may be removed. It was further prayed that during the pendency of the suit the defendant had made some over-hanging encroachment and it was prayed that a decree for mandatory injunction be passed directing her to remove the projection. The defendant denied the allegations and stated that she is the owner of the adjoining land and had raised construction only on her land. Issues were framed by the learned trial court and the suit was decreed in favour of the plaintiff. The defendant preferred an appeal. The plaintiff filed cross objections. The learned Appellate court set aside the judgment and decree and remanded the case for trial afresh after recasting the issues. The issues as recast read as follows:-

1. Whether the defendant has encroached upon any portion of the land of the plaintiff as alleged, if so to what extent ? OPP
2. If issue No. 1 is proved, whether the plaintiff is estopped from filing the suit by his act and conduct and acquiescence as alleged ? OPD

3. Whether the Karukans of the suit land of the plaintiff are not correct as alleged ? OPD
4. Whether the suit of the plaintiff is false and vexatious to his knowledge and thus the defendant is entitled to the special costs as alleged, if so to what amount ? OPD

After remand, the trial court decided issue No. 1 in favour of the plaintiff. Issue No. 2 was decided against the defendant and the trial court held that issues No. 3 & 4 had become redundant. The trial court found that the defendant had made overhanging encroachment and she was directed to remove the same and hand over the vacant possession to the plaintiff. The defendant filed an appeal. The lower Appellate court held that the trial court had erred in holding that issue No. 3 had become redundant. It held, and rightly so, that issue No. 3 should have been first decided. Only after the trial court decided the question whether the Karukans of the suit land were incorrect or not, could it have decided issues No. 1 & 2. However, I am of the view that the lower Appellate Court gravely erred in remanding the case back to the trial court. This court has held time and again that matters should not be remanded when the entire evidence is on record. The present case is a glaring

example of one such case where the issues could have been decided by the Appellate Court itself. The case had already been remanded once after re-casting of issues. The parties were given opportunity to lead evidence in support of their respective contentions. The entire evidence in the matter had been led. The only requirement was that issue No. 3 had to be decided. In terms of Order 41 Rules 23, 23-A, 24 and 25 the learned lower Appellate Court could not have remanded the matter to the trial court. It was the bounden duty of the learned lower Appellate Court to have decided the issues itself since the entire evidence was on record.

In view of the above discussion the appeal filed is partly allowed. Finding of the learned lower Appellate Court that issue No. 3 needs to be decided to appreciate the report of the Local Commissioner before deciding issues No. 1 & 2 is upheld, but the order remanding the case being totally illegal and against the provisions of Order 41 Rules 23 and 25 and the law laid down by this court is set aside. The appeal is remanded to the lower Appellate Court who shall again restore the appeal to its original number. Keeping in view the fact that the original suit was filed in the year 1998, the lower

Appellate Court shall decide the appeal as early as possible and in any event not later than 31st May, 2008. The parties are directed to appear before the trial court on 26th November, 2007. The Registry shall ensure that the record of the case reaches the lower Appellate Court well before the said date.

October 12, 2007(K) (Deepak Gupta), J.